

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

February 22, 2008

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

Regarding: Appointment and Selection of a Hearing Officer to Conduct All Hearings
for One (1) Contested Case Hearing

Subject Petition: Docket No. HA-08-06

In the matter of a Contested Case Hearing request to intervene in Conservation District Use Application (CDUA) HA-3443 for the proposed expansion of open ocean fish farming in offshore waters approximately (≈) 200 feet deep located 0.5 miles southwest of Ulualoha Point, North Kona.

Background

The Department received a petition from Isaac D. Harp on January 25, 2008, and a petition from Kale Gumapac and the Kanaka Council Moku O Keawe represented by Alan Murakami on January 29, 2008 (**Exhibit 1 & 2**).

Authority for Designating Hearing Officers

Hawaii Administrative Rules (HAR) §13-1-32 (d) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. Additionally, Hawaii Revised Statutes (HRS) §92-16 and §171-6 also provides that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for Designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Discussion:

Staff notes HAR, §13-1-31 (3) notes, "all persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application."

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. The determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing should also be conducted by the Hearing Officer rather, than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Staff therefore recommends,

Recommendation:

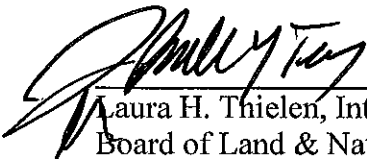
- 1) That the Board authorize the appointment of a Hearing Officer for Contested Case HA-08-06, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested Case Hearing, and
- 2) That the Board delegates the authority for selection of the Hearing Officer to the Chairperson.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



Laura H. Thielen, Interim Chairperson
Board of Land & Natural Resources

STATE OF HAWAII
Office of Conservation and Coastal Lands
POST OFFICE BOX 621 HONOLULU, HAWAII 96809

BOARD OF LAND AND NATURAL RESOURCES
PETITION FOR A CONTESTED CASE HEARING

1. Name Isaac D. Harp Phone 345-6085 Fax None
2. Address P.O. Box 437347, Kamuela, HI 96743
Email Address imua-hawaii@hawaii.com
3. Attorney (if any) pending negotiation Phone _____
4. Address _____
Email Address _____
5. Subject Matter: Kona Blue Water Farms - Proposed Expansion
6. Date of Public Hearing/Board Meeting Public Hearing 1/16/08
7. Legal authority under which hearing, proceeding or action is being made §13-1-31
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: State of Hawaii Ocean Lease to Kona Blue Water Farms Offshore of Unualohia Point, Kona, Hawaii
9. The specific disagreement, denial or grievance with the above matter: Lack of comprehensive science-based evidence that proposed expansion will not result in significant impacts.
10. Outline of specific issues to be raised: Brief track record of KBWF. Draft EA based primarily on assumptions and personal opinion of author.
11. Outline of basic facts: Insufficient government oversight and guiding Rules for industry
12. The relief or remedy to which you seek or deem yourself entitled: Denial of proposal by Kona Blue Water Farms to expand in order to provide the DLNR with time to develop improved Management of industry.
- (If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: 1/23/08

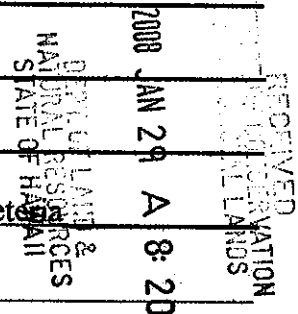
Send completed form to the address above.

EXHIBIT 1

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. NAME: Kale Gumapac and Kanaka Council Moku O Keawe PHONE: 808-982-9020 FAX: 808-966-6032
2. ADDRESS: HC 2 Box 9607, Keaau, HI 96749
Email Address: moku_okeawe@yahoo.com
3. Attorney: Alan Murakami Phone: 808-521-2302 FAX: 808-537-4268
4. Address: 1164 Bishop St., Suite 1205, Honolulu, HI 96813
Email Address: almurak@nhlchi.org
5. Subject Matter: Kona Blue Water Farms LLC Application for Expansion
6. Date of Public Hearing/Board Meeting: January 16, 2008 at Kealakehe H.S Cafeteria
7. Legal authority under which hearing, proceeding or action is being made: _____



The Admissions Act -

- §5(i): Submerged lands are part of the Ceded Lands Trust
- §5(f): Native Hawaiians afforded a distinct interest separate from that of the general public

Supreme Court Decision: Kohanaiki vs. Planning Director, County of Hawai'i

- Native Hawaiians have legal standing to raise issues relating to subsistence, cultural and religious practices.
- All government agencies have an enforceable duty to preserve and protect traditional rights under Article XII, section 7 and must give full consideration to cultural and historic values as well as the needs for economic development when implementing the objectives, policies, and SMA guidelines
- Native Hawaiian rights and practices have equal footing with Western real property rights. Hawaiian usage sets the

foundation for Common Law, HRS, Section 1-1 and Gathering Rights, HRS, Section 7-1

- Legal principals of the state predate western principals and the Supreme Court has signaled its intention to reject taking challenges to the exercise of traditional rights.

Supreme Court Decision: "Ka Pa'akai o Ka 'Aina v. Land Use Commission"

- Remand to LUC for specific findings
- Reaffirms previous court decisions: western concepts of private property must be balanced with traditional rights of native Hawaiians
- Agencies cannot delegate its obligation to determine impacts

Act 50 – Cultural Impact Statement

- Environmental Assessments and Environmental Impact Statements shall address Hawai'i's cultural, traditional and customary rights

8. Nature of your specific legal interest in the above matter, including tax map key of property affected:

The Admissions Act -

- §5(i): Submerged lands are part of the Ceded Lands Trust
- §5(f): Native Hawaiians afforded a distinct interest separate from that of the general public

Coastal Zone Management Act – (Chapter 205A-4):

- Agencies must give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, ...;
- (b) The objectives & policies of this chapter ... shall be binding upon actions within the CZMA by all agencies. (Chapter 205A-5):
- All agencies shall ensure their rules comply with objectives and policies of the CZMA.

9. The specific disagreement, denial or grievance with the above matter: _____

- Impacts to native beneficiaries under §5(f), not adequately identified and assessed
- Inadequate public outreach/public hearings provided to the native Hawaiian community by Kona Blue
- Greater native Hawaiian community not solicited for comments

10. Outline of specific issues to be raised: _____

- Cultural impacts not addressed
- Language genocide – traditional names of fish replaced by foreign names
- Undefined terminology in Environmental Assessment
- Environmental Assessment fails to disclose 100% of the content of the fish food.
- Restriction of cultural and traditional practices and public access in the area of project.
- Located within the Hawaiian Islands Humpback Whale Natural Marine Sanctuary

11. Outline of Basic Facts: _____

- Not clear on lease payments to the State and Office of Hawaiian Affairs
- Selective Breeding does not show long term effects on traditional fish and marine life for traditional food sources.
- Public Trust mandates that the State have a higher level of scrutiny for private commercial uses and to consider the cumulative impact of existing and proposed diversions on trust purposes.
- Government Agencies have an enforceable duty to preserve and protect traditional rights under Article XII Section VII.
- Failed to identify the effects the project would have on the entire Ahupua'a.

12. The relief or remedy to which you seek or deem yourself entitled: _____

Kona Blue must prepare an Environmental Impact Statement and meet with Traditional Practitioners (Konohiki) for approval.
Full disclosure and transparency of future intentions.

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: 1-26-2008